RECORD AND BRIEFS

Nos. 16-74, 16-86, 16-258

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IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, *et al.*,
Petitioners,
—v.—
MARIA STAPLETON, *ET AL.*,
Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, *et al.*,
Petitioners,
—v.—
LAURENCE KAPLAN,
Respondent.

DIGNITY HEALTH, *et al.*,
Petitioners,
—v.—
STARLA ROLLINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR CHURCH DEFENDANT *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "church plan" exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

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INTERESTS OF AMICI CURIAE[1]

The eight Church Defendant Amici[2] are each affiliated with and a part of the Roman Catholic Church, providing health and social services, including in particular to the poor and vulnerable, in conformity with the Church's mission, theology and doctrine. Each has been sued in a "church plan" case in which various plaintiffs have alleged that, contrary to the rulings of the Internal Revenue Service ("IRS") and the U.S. Department of Labor ("DOL"), their pension plans are no longer exempt "church plans."

Each of the Church Defendant Amici was formed by religious orders in the Roman Catholic Church, and grew based on the orders' diligent efforts to further the Church's healing and social service ministries. From the mid-1800's forward, they have provided substantial charity medical care and social services serving the poor and vulnerable. As an example, for over 100 years Church Defendant Amicus the Sisters of Franciscan Missionaries of Our

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[1] All counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici*, their counsel, or their insurers or members made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Church Defendant Amici are (i) Franciscan Missionaries of Our Lady Health System; (ii) Ascension Health Alliance; (iii) Trinity Health Corporation; (iv) Presence Health Network; (v) St. Joseph's Healthcare System, Inc.; (vi) Providence Health & Services; (vii) Mercy Health; and (viii) Hospital Sisters Health System.

Lady, North American Province ("Franciscan Sisters") have dedicated their lives to providing a healing ministry and other related social services in Louisiana. Building on Father Enaut's original 1911 donation of funds and land to start a hospital in Monroe, the Franciscan Sisters grew their healing and social service ministry in Louisiana into what became Franciscan Missionaries. And based on their mission within the Catholic Church, the Franciscan Sisters have gone where they are needed, with a particular focus on serving the poor and vulnerable, *e.g.*, from a ward to serve African American patients in Monroe, Louisiana in the 1910s, to St. Anthony's Home, an AIDS clinic and living facility in Baton Rouge, Louisiana in the 1980s, to the aging and mental and behavioral services needed today.

This long history of religious service is common to the Church Defendant Amici. As a further example, two of the founding congregations of the Presence Health system began their healthcare ministry by establishing hospitals to serve Polish immigrant communities in the Chicagoland area in the late 1800s when they had nowhere else to go for healthcare. The Sisters of St. Joseph of Carondelet, one of the founding religious orders of amicus Ascension Health Alliance, began their social services in the United States in the 1830s, when they established a house for the orphans and the deaf in Carondelet, Missouri, and a school across the Mississippi River in Cahokia, Illinois. The Sisters of Mercy, one of the founding religious orders of amicus Trinity Health Corporation, began serving the poor

and sick in the 1830s and, by 1860, founded hospitals in Iowa and Michigan.

This religious service continues full force in the present. Amicus Mercy Health is a Catholic ministry serving Ohio and Kentucky. As the largest provider of healthcare in Ohio, Mercy Health provides 5.9 million patient encounters each year and invests nearly $1 million each day in charity care and other community benefit. Mercy Health is led by its Mission: "We extend the healing ministry of Jesus by improving the health of our communities with emphasis on people who are poor and underserved." This mission is implemented in a variety of ways, as aptly illustrated by Mercy Health's Resource Mothers Program in Youngstown. Peer support, trained counselors and staff provide mothers with essential care, education and training, and the results are compelling: 94% of babies born in the program achieved term births of 36 weeks or greater; 92% achieved a healthy birth weight; 98% were up to date on their immunizations; a direct impact on the health of the Youngstown community.

In conclusion, each of the Church Defendant Amici has similar backgrounds and, acting on behalf of and serving the mission of the Church, they collectively provide billions of dollars in charitable care to serve the poor and vulnerable. Each also has provided all of the benefits promised in its pension plan, and they have adequately funded the plans

when compared against ERISA's various, ever-shifting funding standards.[3]

SUMMARY OF THE ARGUMENT

A. There can be no credible dispute over whether Congress intended to expand ERISA's "church plan" exemption in 1980 to include churches' good-works ministries. Instead, the present dispute is over whether, when Congress expanded the exemption, Congress intended that churches must first still establish these plans, even if the plans could then be promptly transferred to a church-affiliated organization to maintain. But, as detailed by Petitioners, the legislative history shows that Congress intended for the expanded exemption to allow church-affiliated entities, including pension boards, to establish "church plans." This legislative history further shows that churches were justifiably upset when, in applying ERISA's original 1974 "church plan" exemption, the IRS narrowly defined a church's religious mission as limited to worshipful and sacerdotal functions – a view that fit neither the

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[3] Prior to the Pension Protection Act of 2006, all ERISA plans were funded using actuarially reasonable funding assumptions based on expected investment returns. After 2006, these standards still apply to fund ERISA multi-employer plans, but single-employer ERISA plans were required to use corporate bond rates. These rates have been purposefully suppressed by the Federal Reserve since the Great Recession of 2008, and Congress has patched together several acts offering funding relief to ameliorate the harm caused by these suppressed rates. *See* Moving Ahead for Progress in the 21st Century Act ("MAP–21"), Pub.L. No. 112–141, codified at 26 U.S.C. § 430 and 29 U.S.C. § 1083; and Highway and Transportation Funding Act of 2014 (HAFTA), Pub.L. No. 113–159, § 2003, 128 Stat. 1839 (2014).

Constitution, nor the traditions, theologies, histories and missions of churches in America. Churches thus promptly petitioned Congress, and Congress responded.

The Congressional co-sponsors of the expanded exemption declared that this expanded exemption was needed because "*[p]resent law fails to recognize* that the *church agencies are parts of the church* in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged. . . . The churches consider their agencies as an extension of *their mission.*"[4] Congress implemented these declared goals through statutory text (i) by providing that plans "established and maintained . . . by a church" *include* plans maintained by non-profit organizations that are controlled by or associated with churches, *see* ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i); and (ii) by deeming the ERISA-exempt church to be the statutory employer for the employees of the church-affiliated non-profit organizations. *See* ERISA § 3(33)(C)(ii)(II) & (C)(iii), 29 U.S.C. § 1002(33)(C)(ii)(II) & (C)(iii).

B. As detailed by Petitioners, ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), should be read inclusively, to include within the exemption plans established by church-affiliated non-profit organizations. Petitioners have also detailed the constitutional infirmities that would be caused by reading the exemption narrowly, to include *only* the parts of the church engaged in worshipful-type activities. The Church Defendant Amici agree with

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[4] 124 Cong. Rec. 12,107 (1978) (statement of House Co-Sponsor Conable) (emphasis added).

Petitioners, and focus their argument in this brief on the second ground in support of reading the "church plan" exemption broadly – *i.e.*, on the significance of Congress deeming, for purposes of this exemption, the ERISA-exempt church to be the statutory employer of church-affiliated employees. As to that, the Court has noted that "church" has no universal definition in federal law. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784 & n.15 (1981). Instead, the Court instructed that when a federal religious exemption turns on the employment relationship, the scope of the employment relationship with the church, not a church's worshipful activity, defines the scope of the exemption. *Id.* at 783-85.

C. Tellingly, ERISA's coverage is limited to and defined by the employment relationship. *See* ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (an ERISA pension plan is "any plan, fund, or program . . . established or maintained by an employer . . . [to] provide[] retirement income to employees"); *see also, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320-21 (1992) (noting that ERISA claim is predicated on the employment relationship); *Yates v. Hendon*, 541 U.S. 1, 21-22 (2004) (noting employee relationship is necessary to coverage under Title I of ERISA). Yet for purposes of this exemption, Congress designated the ERISA-exempt church to be the statutory employer of the employees of its church-affiliated organizations.

D. This structure was intentional. First, as detailed by Petitioners and by amicus such as the Church Alliance, "churches" (which include not just

Christian, but also Jewish, Muslim and other religions) come in many different forms and organizational structures in America. Some of these organizational structures make it impossible to have a central "church" establish a plan – *e.g.*, for many congregational churches, a church-affiliated pension board, not the "church" as such, must establish and maintain the pension plan. Congress solved this constitutionally fraught issue and avoided any denominational discrimination[5] by bringing within the exemption all forms of "churches" *and* their affiliated agencies by redefining, for purposes of ERISA, the ERISA-exempt church as the employer of these church-affiliated employees.

Second, in justifying its expansion of the exemption, Congress repeatedly observed that "[p]resent law fails to recognize that the *church agencies are parts of the church* in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged. . . . The churches consider their agencies as an extension of their mission." 124 Cong. Rec. 12,107 (House Co-Sponsor Conable) (emphasis added). As the Senate Co-Sponsor, Senator Talmadge, explained:

> Church agencies are essential to the churches' mission. They are for the sick and needy and disseminate religious instruction. They are, *in fact, part of the churches.* As a practical matter, it is doubtful that the agency plans would

[5] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

> survive subjection to ERISA. . . . The churches fear that many of the agencies would abandon their plans.[6]

And the churches left no doubt on where they stood on this, *e.g.*, Jewish, Lutheran, Baptist, Christian Reformed, and Episcopal churches each explained that they needed this expanded exemption precisely to give effect to the fact that their church agencies are "parts of the church," not separate from it.[7] This occurred against a background in which, in performing their good works, churches and their supporting religious organizations are *not* disabled from using corporate forms to protect and carry out their religious missions. *See, e.g., Wheelock v. First Presbyterian Church of LA*, 51 P. 841, 843-44 (Cal. 1897); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767-68 (2014). Moreover, at least absent abuse, a church is free to structure its administration, define its polity, *e.g., Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 709-14 (1976), and pursue its mission based on *its* theology and doctrine, not someone else's views of what constitutes appropriate "church" activity. *See e.g., Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 & n.14 (1987).

E. In sum, for purposes of this expanded exemption, Congress intended that "church" be construed broadly to include within the exemption

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[6] 125 Cong. Rec. 10,052 (1979) (statement of Sen. Talmadge) (emphasis added).

[7] *Id.* at 10,054-57.

the church's good-works ministries that a church considers to be acting in the name of and performing the work of the church, such as schools and hospitals. Congress deeming the ERISA-exempt church to be the statutory employer of these church-affiliated employees in ERISA § 3(33)(C)(iii), 29 U.S.C. § 1002(33)(C)(iii), is the statutory mechanism that does just this. Federal religious exemptions that depend on the employment relationship, not surprisingly, are defined by the employment relationship. Here, ERISA's coverage *is* defined by the employment relationship, and for purposes of applying this exemption, Congress purposefully made the ERISA-exempt church the employer. Further, for purposes of this exemption, the churches' mission can and does include the good-works performed by the churches' healing and social service ministries. Finally and most important, these church-affiliated organizations are included as parts of the church ***regardless*** of whether they are incorporated. *See* ERISA § 3(33)(C)(ii)(II), 29 U.S.C. § 1002(33)(C)(ii)(II) (providing that employees of church-affiliated organizations remain employees of the ERISA-exempt church "whether [the church-affiliated organization is] a civil law corporation or otherwise"). Thus, construing church in this broader sense both comports with this statutory text and religious practices, while avoiding constitutionally fraught inquiries into a church's proper mission and role, inquiries Congress sought to end by expanding this exemption.

ARGUMENT

I. THE "CHURCH PLAN" EXEMPTION ALLOWS CHURCHES' GOOD-WORKS MINISTRIES TO FURTHER THEIR RELIGIOUS MISSION ON BEHALF OF THE CHURCH

Amicus the Catholic Health Association aptly lays out the long history and the importance of Catholic healthcare in the Roman Catholic Church. As further detailed therein, under the Church's polity, doctrine and canon law, those who are recognized as "Catholic" by the applicable diocesan bishop are engaging in the work of and are a part of the Church. As Pope John Paul II explained in a speech in the United States on Catholic healthcare:

> Your health care ministry, pioneered and developed by congregations of women religious and by congregations of brothers, is one of the most vital apostolates of the ecclesial community and one of the most significant services which the Catholic Church offers to society in the name of Jesus Christ.[8]

The Church Defendant Amici are each carrying out their mission to heal and serve in the name of and under the control of the Roman Catholic Church. They are each part of the Church. This is not unique to the Catholic Church – indeed, as noted, the Jewish, Lutheran, Baptist, Christian Reformed, and Episcopal churches each explained to Congress why

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[8] Pope John Paul II, *Health Care: Ministry in Transition* (Sept. 14, 1987), *in* MEDICAL ETHICS, SOURCES OF CATHOLIC TEACHINGS 88 (Kevin D. O'Rourke & Philip J. Boyle, eds., 4th ed. 2011).

they needed this expanded exemption to give effect to the fact that their church agencies are, in fact, "parts of the church," not "separate" from it. [9]

The "church plan" exemption has thus allowed amici and other church-affiliated organizations to further their religious mission. They can invest plan assets in a socially responsible manner, consistent with their religious precepts, free from ERISA's demands to maximize plan profits in relation to risk. And funds that would otherwise be diverted to pay regulatory and compliance costs (including Pension Benefit Guaranty Corporation ("PBGC") premiums) are available to further their religious mission, including to provide charitable medical care and social services to serve the poor and vulnerable, and to offer benefits and just wages to their employees in conformity with Catholic doctrine and social teaching.[10] As an example, amicus the Franciscan Sisters has vigorously implemented the Church's command to help the working poor, including in particular team members employed by Franciscan Missionaries. These religious values have influenced (free of ERISA's costly structure and limitations) the benefits offered to team members, including low-cost loan programs, subsidized or free medical care, and free or reduced cost healthy food options. These are just some of the Church-influenced benefits that the Franciscan Sisters are targeting to help the working

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[9] 125 Cong. Rec. 10054-57.

[10] *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 12 ¶ 7 (5th Ed. 2009) ("Ethical and Religious Directives").

poor at Franciscan Missionaries. Catholic doctrine and social teaching have further influenced the amount of the retirement benefits offered employees. For example, in 2000 the Franciscan Sisters used the Jubilee Year in the Catholic Church[11] as the occasion to raise pensions being paid to those already retired by at least 5%.

II. THE CHURCHES' GOOD-WORKS MINISTRIES ARE "PARTS OF THE CHURCH" UNDER CONGRESS' EXPANDED "CHURCH PLAN" EXEMPTION

As noted, the Church Defendant Amici are each carrying out their mission to heal and to serve in the name of and under the control of the Roman Catholic Church. They are each part of the Church. This point, that under the religious doctrines, traditions, theologies and missions of churches in America, churches' "good works" ministries *are* parts of the church – was made repeatedly by churches to Congress to justify expanding the narrow exemption originally enacted by ERISA.[12] The original, narrow exemption failed to reflect that, in America's history, churches often were the primary if not sole source of social and charitable services.[13]

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[11] "In the Roman Catholic tradition, a Holy Year, or Jubilee is a great religious event." *What is a Holy Year?,* JUBILAEUM A.D. 2000, http://www.vatican.va/jubilee_2000/docs/documents/ju_documents_17-feb-1997_history_en.html.

[12] 125 Cong. Rec. 10,054-57.

[13] *See, e.g.*, 3 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 13:2 (2013) ("American social welfare has its roots in religious ministries caring for the sick and for other often neglected or outcast members of society: 'In our country's infancy [...] the sick were often lumped together

A. Legislative History and ERISA's Structure

In light of the history, doctrine, and polities, of churches in America, they supported the legislation creating the expanded exemption precisely because the definition of "church plan" was being amended to recognize that their good-works ministries were and still are parts of the church:

- Union of American Hebrew Congregations – supporting amendment of "church plan" definition "so that *agencies such as ours are recognized as part of a church* . . . and are entitled to participate in such a church plan." *See* 125 Cong. Rec. 10,054 (emphasis added);
- American Lutheran Church – same, supporting amendment of "church plan" definition "so that *church related agencies are recognized as part of a church* . . . and entitled to participate in a church plan." *Id.* at 10,055 (emphasis added);
- Southern Baptist Convention – same, supporting changes to "church plan"

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with the mentally ill, vagrants, alcoholics, as well as the homeless and poor in public almshouses and poorhouses.' Long before the first nursing schools were established in the 1870s, Catholic Sisters caring for the sick in Catholic hospitals recorded their procedures for caring for patients with cholera and yellow fever.") (alteration in original) (quoting Thomas John Paprocki, *Caring for the Sick: The Catholic Contribution and Its Relevance*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 447, 448 (2011)). For a history of Catholic healthcare in America, *see, e.g.*, CHRISTOPHER J. KAUFFMAN, MINISTRY AND MEANING: A RELIGIOUS HISTORY OF CATHOLIC HEALTH CARE IN THE UNITED STATES (1995).

definition "so that *church related agencies are recognized as part of a church* . . . and entitled to participate in a church plan." *Id.* at 10,056 (emphasis added);

- Christian Reformed Church – same, supporting changes to "church plan" definition "so that *church related agencies are recognized as part of a church* . . . and entitled to participate in a church plan." *Id.* (emphasis added);
- General Convention of the Episcopal Church – same, supporting changes to "church plan" definition "so that *church related agencies are recognized as part of a church* . . . and entitled to participate in a church plan." *Id.* at 10,057 (emphasis added).

Congress listened. The Congressional co-sponsors declared that this expanded exemption was needed because "[p]resent law fails to recognize that the *church agencies are parts of the church* in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged. . . . The churches consider their agencies as an extension of *their mission.*"[14] And as noted, Congress gave effect to these declared goals (i) by providing that plans "established and maintained by churches" *include* plans maintained by non-profit organizations that are controlled by or associated with churches, *see* ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), and (ii) by making the ERISA-exempt church the

[14] 124 Cong. Rec. 12,107 (emphasis added).

statutory employer for employees of the church-affiliated non-profit organizations. *See* ERISA § 3(33)(C)(ii)(II) & (C)(iii), 29 U.S.C. § 1002(33)(C)(ii)(II) & (C)(iii).

Both grounds support reading the exemption broadly. Petitioners' brief details why the first ground requires an inclusive construction of the exemption. Petitioners also detail the constitutional infirmities that would occur if the exemption were read to construe "church" narrowly, as the IRS did pre-amendment by concluding – contrary to America's religious traditions – that "church" only includes the parts of the church engaged in worshipful-type activities. The Church Defendant Amici agree with Petitioners, and focus here on the second ground for an inclusive construction – that deeming the ERISA-exempt church to be the statutory employer of church-affiliated employees has profound structural significance under ERISA, which requires "church" to be construed broadly for purposes of this exemption. As noted, the Court has observed that "church" has no universal definition in federal law, *St. Martin Evangelical Lutheran Church*, 451 U.S. at 784 & n.15; and instructed that for a federal exemption that depends on the employment relationship, the scope of the employment relationship with the church, not worshipful activity, defines the scope of this exemption. *Id.* at 783-85.

Here, ERISA's coverage is limited to and defined by the employment relationship – this is a structural aspect of ERISA. The "Employee" part of the "*Employee* Retirement Income Security Act," *i.e.*,

ERISA, gives it away. ERISA's coverage thus depends on and is defined by the employment relationship. *See* ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (an ERISA pension plan is "any plan, fund, or program . . . established or maintained by an employer . . . [to] provide[] retirement income to employees"); *see also, e.g.*, *Nationwide Mut. Ins. Co.*, 503 U.S. at 320-21 (noting that ERISA claim is predicated on the employment relationship); *Yates*, 541 U.S. at 21-22 (noting employee relationship is necessary to coverage under Title I of ERISA).[15] ERISA also makes the "employer" the ERISA-required "plan sponsor" of the plan, *see* ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). Yet for purposes of the "church plan" exemption, the ERISA-exempt church is deemed to be the "employer," and hence the "plan sponsor."[16]

Courts and the DOL have also long given effect to the statutory language deeming the ERISA-exempt

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[15] *See also, e.g., MDPhysicians & Assocs. Inc. v. State Bd. Of Ins.*, 957 F.2d 178, 183, 185-186 (5th Cir. 1992) (holding plan must be established and maintained by an employer to be an ERISA plan, explaining centrality of employer-employee relationship to ERISA's coverage); *West v. Clarke Murphy, Jr. Self Employed Pension Plan*, 99 F.3d 166, 168 (4th Cir. 1996) ("The essence of an employee pension benefit plan covered by ERISA is an employer-employee relationship.").

[16] The employer-employee relationship is central to ERISA's statutory structure. In addition to the points noted in the text above, ERISA requires that to be a "participant" with statutory standing to sue under ERISA, the participant must be the employee of an employer, *see* ERISA § 3(7), 29 U.S.C. § 1002(7). Here for purposes of the "church plan" exemption, these employees are deemed by the statutory text to be "church employees" of an ERISA-exempt church.

church to be the "employer" of these church-affiliated employees. *See, e.g., Rinehart v. Life Ins. Co. of N. Am.*, No. 08-cv-5486, 2009 WL 995715, at *3-4 (W.D. Wash., Apr. 14, 2009) (concluding that these provisions broaden the scope of the exemption to include the plans of these "church" employees). Because the ERISA-exempt church is the deemed employer, the DOL concludes that, under ERISA, this means the church as employer is deemed "to have established and . . . maintain[ed] the [p]lans."[17] *See, e.g.*, DOL Op. Ltr. 94-04A, 1994 WL 58680, at *4 (Feb. 17, 1994) (the DOL also agrees with the IRS that the exemption includes under ERISA § 3(33)(C)(i) plans maintained by church-affiliated organizations). In light of ERISA's structural requirements, the DOL's construction on this is reasonable, and is due deference in this context for the reasons detailed by Petitioners.

It is also worth noting that Congress had significant reasons to deem the church to be the employer of church-affiliated employees. First, as detailed above, under the religious doctrines, traditions, theologies and missions of churches in America, their good-works ministries *are* considered by churches to be parts of the church, not separate from it. Churches petitioned Congress on this point, and Congress responded.

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[17] *See also, e.g.*, U.S. Dep't of Labor, Office of Pension & Welfare Benefit Programs, Opinion Letter ("DOL Op. Ltr.") 94-05A, 1994 WL 83200, at *6 (Mar. 8, 1994) (same); DOL Op. Ltr. 94-09A, 1994 WL 86984, at *4 (Mar. 17, 1994) (same); DOL Op. Ltr. 95-13A, 1995 WL 369560, at *4 (June 19, 1995) (same).

Second, "churches" come in many different forms and organizational structures in America, some of which make it impossible within their religious framework, beliefs, polities, and traditions to have a central "church" establish a plan – *e.g.*, for many congregational churches, a church-affiliated pension board, not the "church" as such, must establish and maintain the pension plan. *See, e.g.,* 124 Cong. Rec. 12,107 (explaining why expanded exemption needed to address this); 126 Cong. Rec. 12,982-83 (1980) (statement of Sen. Talmadge) (Senator Talmadge submitting resolution of the Southern Baptist Convention explaining why expanded exemption was needed to include its affiliated pension board, which provides benefits to the ministers and lay workers in the various separate missions and ministries of the Baptist denomination). Per Senator Talmadge, "[a] plan or program funded or administered through a pension board ... *will be considered a church plan.*" 125 Cong. Rec. 10,053 (emphasis added). Senator Talmadge further explained that "to accommodate the differences in beliefs, structures, and practices among our religious denominations, all employees are deemed to be employed by the denomination . . . [and the term "employee" is to be redefined to include] an employee of an organization which is exempt from tax and which is controlled by or associated with a church . . . ." 125 Cong. Rec. 10,052. Congress thus solved this constitutionally fraught problem and avoided denominational discrimination by bringing within the exemption *all* forms of "churches" *and* their affiliated agencies through defining, for purposes of ERISA, their

church-affiliated employees to be employees of the "church." [18]

B. Responses to Plaintiffs' Arguments

In the courts below plaintiffs have tendered several arguments attacking the import of Congress deeming the ERISA-exempt church to be the statutory employer. These arguments are flawed. In one argument, plaintiffs assert that deeming the church to be the employer of these church-affiliated employees was necessary solely for tax purposes: that for a "church plan" to be a tax-qualified pension plan (and thus defer recognition of income to the plan participants) the Internal Revenue Code requires that benefits be provided for the "exclusive benefit" of the employees of the employer. *See* 26 U.S.C. § 401(a). Plaintiffs concede that, at least for plans established by churches, that they can include employees of church-affiliated non-profit organizations. According to plaintiffs, to satisfy this "exclusive benefit" rule, deeming the church to be the employer was necessary to have the benefits go exclusively to employees of the exempt church.

This is accurate as far as it goes on the tax aspect of this designation, but this argument suffers from several fatal flaws. First, plaintiffs' "tax only" limitation appears nowhere in the exemption.

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[18] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. This exemption thus should not be construed to prefer congregational forms of churches over hierarchal ones by including only congregational pension boards within the exemption, while excluding everyone else's church-affiliated organization – particularly since the statutory text supports an inclusive construction.

Second, and more important, these "deemed employer" provisions were enacted not only in the "church plan" exemption codified in the tax code at 26 U.S.C. § 414(e), but also in full in the ERISA Title I provisions codified at ERISA § 3(33), 29 U.S.C. § 1002(33). There is *no* tax purpose served when Congress enacted these "deemed employer" provisions in Title I of ERISA; instead by adding these ERISA provisions, Congress made the ERISA-exempt church the employer of these employees and – as intended – this includes church agencies as "parts of the church" for all forms of churches in America.

Plaintiffs have also argued that churches take themselves outside of the exemption if the church's mission goes beyond worshipful activity to include good works, such as schools or hospitals that focus on serving the poor and vulnerable, at least when the churches elect to incorporate their good-works ministries. But, as to mission, under the First Amendment it is for the church to define its religious mission, *e.g.*, *Hernandez*, 490 U.S. at 699; *Amos*, 483 U.S. at 336 & n. 14, which is not limited to worshipful activities. Healing plainly falls within the Roman Catholic Church's religious mission, and the Church has engaged in healing from Roman times to today. "The founder of the Christian faith himself also healed many as an application of his religious principles and to further those principles." *Hanclerode v. Sisters of Mercy of Indep., Kan., Inc.*, No. 79-4022, 1981 WL 394149, at *2 (D. Kan. Nov. 3, 1981). And as federal courts have often noted, limiting churches to a house of worship "would be for

us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary." *Alabama v. Marshall*, 626 F.2d 366, 368-69 (5th Cir. 1980); *see also, e.g., Cohen v. City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993) ("First, it is not up to legislatures (or to courts for that matter) to say what activities are sufficiently 'religious.'"). Congress agrees. In enacting the expanded "church plan" exemption, Congress explained that a church's religious mission should be construed broadly, since "church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged."[19]

In sum, under the Constitution and under Congress' expanded "church plan" exemption, it cannot credibly be disputed that a church can choose to extend its religious mission beyond worshipful activities to include good works, such as schools and hospitals. This gets to the heart of plaintiffs' argument: that if a church elects to separately incorporate its good-works ministries, then that act of incorporation supposedly takes the plans of that religious ministry outside the exemption. This argument is inconsistent with church doctrine, federal law and, perhaps most important, is contradicted by the very exemption Congress enacted.

Regarding civil law incorporation, the Roman Catholic Church's canon law requires that those who act on behalf of the Church undertake prudent

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[19] 124 Cong. Rec. 12,107.

actions to protect the resources of the Church engaged in its various ministries. *See Codex Iuris Canonici*, 1983 Code c.1284, § 2(2);[20] *see also, e.g.*, Francis G. Morrisey, *Canon Law - A Guide for Church Stewards,* CATHOLIC HEALTH ASSOC'N OF U.S. (Mar.-Apr. 2010).[21] Prudent actions, such as incorporating the Church's ministries to operate in the secular world, is thus a *religious* obligation of those who act on behalf of the Roman Catholic Church (and likely of many other churches). *Id.*

Equally important, there is nothing in federal law that purports to disenfranchise churches and their stewards from following their religious obligations to protect a church's good-works ministries, including by using corporate forms available to secular non-profits. *See, e.g., Wheelock*, 51 P. 841 at 843-44 (allowing church to incorporate to facilitate its operation in the temporal world does not change that the ecclesiastical body is central and controlling – the corporation holds the property as agent to achieve the spiritual ends of the church). Dioceses, religious institutes, and the good-works ministries of churches are thus each often incorporated so that they can achieve the mission and spiritual goals of the Church in the secular world. Indeed, in *Hobby Lobby* the Court observes that churches commonly exercise their religion through corporate forms, 134 S. Ct. at 2768-69, and held that religious

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[20] The Roman Catholic Church's official English translation of the Code of Canon Law may be found at http://www.vatican.va/archive/ENG1104/_INDEX.HTM.

[21] https://www.chausa.org/publications/health-progress/article/march-april-2010/canon-law---a-guide-for-church-stewards.

organizations – including, of course, churches – may use corporate forms without forfeiting their religious liberties, extending this principle even to for-profit corporations.[22] *Id.* at 2767-68. How a church structures its polity and administration is, under the First Amendment, for the church to decide. *E.g.*, *Milivojevich*, 426 U.S. at 709, 713-14, 714 n.8; *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969).

Finally, and perhaps most important, in the "church plan" exemption Congress provides that incorporation would most assuredly *not* affect the scope of the exemption. Specifically, Congress provides that the ERISA-exempt church remains the employer of these church-affiliated employees (and these employees remain employees of the church) *even if* the church-affiliated non-profit organization is incorporated. Thus, ERISA § 3(33)(C)(ii)(II), 29 U.S.C. § 1002(33)(C)(ii)(II), provides that employees of a church-affiliated non-profit organization "*whether a civil law corporation or otherwise*" are employees of the church. (Emphasis added). And

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[22] *See also, e.g.*, 3 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 3:4 (2013) ("Legal status in and of itself has no effect upon the religious status of an organization. It is merely the use of a civil form, much like the registration of marital records or any other civil service, to protect individuals in the church and to better protect and utilize the church's temporal assets.". . . "The constitutionally protected right of citizens to assemble and form cooperative ventures is not conditioned or burdened in state law upon abdication of religious faith or mission. To hold otherwise would fly in the face of the most basic constitutional jurisprudence.").

ERISA § 3(33)(C)(iii), 29 U.S.C. § 1002(33)(C)(iii), provides that, for purposes of this exemption, the church is deemed to be the employer of these same employees.

C. Conclusion

For purposes of this exemption, Congress intended that "church" be construed broadly to include a church's good-works ministries acting in the name of and performing the work of the church. In sum:

First, federal religious exemptions that depend on whether the church is the employer, not surprisingly, are defined by the employment relationship, not the scope of worshipful activity. *See St. Martin Evangelical Lutheran Church*, 451 U.S. at 783-85. Likewise, ERISA's coverage is defined and limited by the employment relationship. Yet for purposes of this exemption Congress deemed the ERISA-exempt church to be the employer of the church-affiliated employees, who are likewise deemed to be employees of the church.

Second, churches' missions can and do extend beyond worshipful activity to include their good-works ministries – a point repeatedly recognized by Congress in justifying its enactment of this expanded exemption.

Third, the "church plan" exemption and federal law confirm that in carrying out its mission a church is *not* disabled from using corporate forms available to secular non-profits to protect their good works ministries. Rather, under this exemption, the ERISA-exempt church remains the statutory

employer of the employees of the church-affiliated organizations, "whether [it is] a civil law corporation or otherwise." ERISA § 3(33)(C)(ii)(II), 29 U.S.C. § 1002(33)(C)(ii)(II).

Thus, even if the Court concludes that only a church can establish a "church plan," for purposes of applying this exemption church includes its constituent parts, its church-affiliated organizations, regardless of whether they are separately incorporated. Reading the "church plan" exemption provisions together, under ERISA § 3(33)(A) & (C), 29 U.S.C. § 1002(33)(A) & (C), it is the church, acting through its constituent parts, that is establishing the plan.

III. The Plans and Plan Sponsors' Long-Standing Reliance and Need for Pension Predictability Strongly Support Deference to the Federal Agencies' Thirty-Plus Years of Consistent Construction of the "Church Plan" Exemption

For the reasons articulated herein and in Petitioners' brief, the Church Defendant Amici submit that the plain language of the "church plan" exemption indicates that the exemption includes plans established by a church's good-works ministries, regardless whether those ministries are separately incorporated. But to the extent there is any ambiguity in this statutory text, deference to the thirty-plus years of the consistent, inclusive interpretation adopted and applied by the three applicable federal agencies – the IRS, DOL and

PBGC – is warranted here. Petitioners' brief aptly details why *Skidmore*[23] deference is due here.

In further support of *Skidmore* deference, the Church Defendant Amici note that the reliance interests and the need for predictability in the pension context strongly counsel deference here. Predictability is a paramount need for pension plan administration, *e.g., Conkright v. Frommert*, 559 U.S. 506, 517-23 (2010), and the federal agencies have sound statutory grounds and policy reasons to construe the "church plan" exemption inclusively. ERISA compliance is "enormously complex" and costly, *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993); in addition to diverting funds that could otherwise be dedicated to the religious mission, ERISA compliance would directly impinge on religious liberties, including by forcing religious organizations to invest their plan assets regardless of their religious precepts, and by limiting the creative types of church-influenced benefits that church ministries can otherwise target to their working poor.

This need for predictability applies with added force here since the Church Defendant Amici and other church-affiliated organizations have acted in good faith reliance on the federal agency rulings that their plans are exempt "church plans." Thus, for thirty-plus years these religious organizations have acted in good faith reliance on these rulings when making financial decisions such as (i) in determining the sustainable levels of charitable care they can

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[23] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

offer, such as Mercy Health's Resource Mothers' Program in Youngstown, Ohio, to Franciscan Missionaries' offering of mental health, aging and behavioral services needed today in Louisiana, and (ii) in offering richer pensions than are commonly offered in the secular sphere.[24] Upsetting these settled expectations would whipsaw these religious organizations with enormous, unexpected retroactive and prospective liabilities and expenses *after* they have already incurred these expenses in charitable care and in pension benefits for their employees.[25]

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[24] As Petitioners note, only 16 percent of private hospital employees have access to a defined-benefit plan at all. *See* BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS SURVEY, RETIREMENT BENEFITS: ACCESS, PARTICIPATION, AND TAKE-UP RATES (Mar. 2015), http://www.bls.gov/ncs/ebs/benefits/2015/ownership/private/table02a.htm.

[25] As Petitioners have detailed, in these lawsuits plaintiffs are seeking billions in notice penalties: they also have sought to recover monetary remedies representing the alleged value to the religious organizations from not following ERISA's ever-changing funding rules, and to reflect the value of unpaid PBGC premiums. Plaintiffs further seek to use ERISA to retroactively and unexpectedly increase benefits *beyond* those that were promised, accrued, and funded by the religious organizations.

CONCLUSION

For these reasons, the judgments of the Courts of Appeal should be reversed.

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Respectfully submitted,

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